91-866

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. _____

ROBERT M. ADAMS, ET AL.,

PETITIONERS,

v.

LTV STEEL MINING COMPANY, ORE MINING COMPANIES PENSION PLAN AND PENSION COMMITTEE, ORE MINING COMPANIES PENSION PLAN,

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Under ERISA where a pension plan contains a provision expressly giving the employer-fiduciary the right to determine from time to time if its best interest is served by allowing a specific early retirement benefit which is based on a combination of years of service and age, may the employer-fiduciary, after enactment of the Retirement Equity Act of 1984, prevent an otherwise eligible employee from enjoyment of that benefit by simply determining not to make it available to a particular group of employees.

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Additional Petitioners not named in caption are:

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With respect to LTV Steel Mining Co. (formerly known as Erie Mining Company), its parent company is LTV Steel Co. The managing agent for LTV Steel Mining Co. is Pickand-Mathers & Co.

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The Petitioners respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (A00001-00011) is reported at 936 F.2d 368. The Order and Opinion of the District Court (A00012-00082) is unreported.

JURISDICTION

The judgment of the Court of Appeals (A00083-00085) was entered on June 13, 1991. Petition for Rehearing was denied on July 26, 1991 (A00086). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners brought an action in the United States District Court for the District of Minnesota claiming that they were improperly denied an early retirement benefit under section 2.6(d) of their pension plan, in violation of both the

Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001-1461 and the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 141, 158.

Petitioners moved for partial summary judgment in the District Court on the issue of breach of fiduciary duties under 29 U.S.C. § 1104(a)(1) and unlawful discrimination under 29 U.S.C. § 1140. Defendants cross-moved on those issues but also moved for summary judgment on the remaining claims relating to ERISA and LMRA; petitioners did not join in those motions and opposed them on both disputed facts and legal grounds.

The District Court denied the motion of petitioners and granted the motion and cross-motion of the defendants. The Eighth Circuit Court of Appeals affirmed the District Court in all respects in its Opinion dated June 13, 1991, and denied rehearing on July 26, 1991.

Petitioners were mining employees for LTV Steel Mining Company ("LTV") and participants in the Ore Mining Companies Pension Plan ("plan"). Some petitioners have retired under plan provisions (other than the early retirement provision in question) since this action was commenced and some have not made application for such early retirement but claim they are entitled thereto because it was eliminated as a benefit while they were participants in the plan. Petitioners were also bargaining unit members of the United Steel Workers of America ("union") local 4108.

LTV is the "employer" and "plan sponsor" with respect to the plan within the meaning of 29 U.S.C. § 1002(5) and § 1002(16)(B).

The plan is an "employee pension benefit plan" or a "pension plan" within the meaning of 29 U.S.C. § 1002(2) and is administered by a pension Committee

("Committee"). The Committee is an administrator of the plan within the meaning of 29 U.S.C. § 1002(16)(A). During all times in question the Committee had only two members, the employer's manager for employee benefits and its vice president for operations. The Committee is responsible for processing pension applications under section 8.2(h) of the plan.

Until April 1, 1986, all salaried and hourly employees participated in the plan. Effective April 1, 1986, salaried employees began to participate in a separate defined contribution plan but those salaried employees already in the plan retained a frozen benefit in the plan.

The 70/80 pension benefit in question is an early retirement benefit available to employees meeting a combination of age and years of service requirements. The relevant provisions are contained in section 2.6 of the plan, which has four

options in subparagraphs (a), (b), (c), and (d). Subparagraphs (a), (b), and (c) deal with early retirement where there has been a break in continuous service by reason of a permanent shutdown, layoff resulting from a permanent shutdown or a layoff where return to work is declared unlikely by the employer or a layoff under a permanent shutdown and acceptance of a job with another employing company. Only section 2.6(d) makes no reference to breaks in continuous service or permanent shutdowns; it simply says that an employee may apply if he considers it would be in his interest to retire, his employer considers that such retirement would be in its interest, and "...by applying like rules in a nondiscriminatory manner to like or similar circumstances, approves an application for retirement under mutually satisfactory conditions...". This benefit is attractive to employees because with less than 30 years' service it provides

for a pension benefit not actuarially reduced and there is a $400 monthly supplement until attaining age 62. Neither the Committee nor the employer published any rules governing applications under section 2.6(d).

During the years 1982 through April 1, 1986, 70/80 under section 2.6(d) was used by the employer to reduce the salaried work force because of depressed conditions in the industry. Management made the determination who was to be selected, evaluated the costs, and approved or rejected the proposed employee. If approved, the employee would be informed that a 70/80 retirement was available and was actively encouraged to accept the offer. An employee was purportedly free to reject the offer, but some who refused were demoted instead. During the 1982-86 period, there were a number of initiatives aimed at reducing the salaried work force. Some employees

who had previously turned down an offer were solicited more than once and other employees who were not initially targeted for retirement applied for and were subsequently awarded a 70/80 pension. Of the approximate 100 salaried employees who formally submitted written applications for 70/80 retirement, none were rejected by the Committee.

During 1982 through 1986, the average hourly work force was also reduced. It went from a high of 1,641 in January, 1982, to as few as 34 through January, 1986. After June, 1982, not less than 527 hourly workers were in permanent layoff for over five years. While management claimed that after the summer of 1986 it increased production to maximum operating levels which required all laid off hourly employees to be returned, the "average manpower listing" through 1987 shows that the bargaining unit employees never exceeded 1,114.

Before petitioners made formal application for their 70/80 benefits in 1987, management had determined (but not announced to the work force) that 70/80 retirements under paragraph 2.6(d) would not be available to the hourly work force because it was cheaper to lay off younger hourly employees (pursuant to seniority) than to provide retirement incentives to older employees eligible for early retirement. While it would have been cheaper to similarly lay off salaried employees during 1982 through 1986, it was not done because management claimed that it wanted to retain the more technically qualified younger salaried people.

In 1987, provision was made for two hourly workers to receive 70/80 retirement benefits under section 2.6(d). These offers were made as part of negotiated agreements with the union in exchange for consenting to a change in the method of delivery of drinking water to field em-

ployees (February, 1987), and the creation of a new classification of utility equipment operator (April, 1987) who would be paid a lower rate than a shovel operator but a greater rate than a tractor operator. Neither agreement of February, 1987, or of April, 1987, specifically addressed a permanent reduction in the work force. The two hourly workers so approved for section 2.6(d) early retirement had not made written application before being selected and were not part of the group of petitioners.

Of the 55 petitioners, 47 formally submitted applications for a 70/80 benefit during 1987--some of them on two occasions. All applications were rejected.

Of the remaining eight petitioners, one did not submit a written application because he had already retired in 1986. The seven other petitioners did not submit written applications during 1987 because they did not have the requisite age and

years of service to qualify for 70/80 at that time. Their only challenge here is to the elimination of the 70/80 provisions from the plan.

Of the 47 petitioners who submitted written applications during 1987, 20% were not eligible until 1987. Of those who had been eligible prior to 1987, including the one who retired in 1986, many of them had been led to believe by management that a 70/80 pension was only in a separate plan for salaried workers and was simply unavailable to the hourly work force.

The event triggering petitioners' formal written applications in 1987 was that one petitioner had learned in 1986 that the 70/80 provisions in the plan did in fact cover both salaried and hourly workers, despite his being led to believe otherwise.

Because of the prior decision by management that they were not going to give any mutual 70/80 retirement to hourly

workers, the applications were summarily rejected by management and the Committee. The Committee did not review the basis for the management decision. Its only role was the signing of the denial letter. No specific reasons for denial were set forth in the denial letters.

The petitioners whose applications were denied then promptly filed a grievance with the union, which declined to pursue the grievance.

Management claimed that the long-term financial health of the plan could be adversely impacted by approving the applications, but conceded that the costs were not evaluated at the time the applications were submitted; and the plan was then overfunded by approximately $39.5 million.

REASONS FOR GRANTING THE PETITION

I.

The Court of Appeals decision below effectively emasculates the provisions of the Retirement Equity Act of 1984, 29 U.S.C. § 1054(g)(2) (REA).

As to benefits provided under a plan, the anti-cutback rule under 29 U.S.C. § 1054(g) was designed to prevent formal or informal plan amendment so as to eliminate or reduce existing benefits. REA amended the rule by providing explicitly, for the first time, that the elimination or reduction of an early retirement benefit amounts to reducing an accrued benefit. The (restated) plan in this case was adopted on April 1, 1986, and REA was enacted in 1984. Thus, when the restated plan was adopted, the employer was on notice that an early retirement benefit, such as the one provided under section 2.6(d) of this plan, was

treated as an accrued (or protected) benefit.

The Internal Revenue Service, along with the Department of Labor, has joint jurisdiction of the administration of the plan. Under Treas. Reg. § 1.411(d)-4, it is provided in Q&A-4 that a plan which permits the employer, directly or indirectly through the exercise of discretion, to deny a participant a protected benefit for which the participant is otherwise eligible "but for the employer's exercise of discretion" violates the requirements of Code § 411(d)-6, 29 U.S.C. § 1054(g). Nevertheless, the Court of Appeals effectively ignored this provision in its Opinion, as follows:

A. At 936 F.2d 369, it points out that the employer had adopted a policy of denying early retirement to all hourly employees under section 2.6(d) unless the union agreed to a corresponding permanent reduction in the number of hourly jobs,

and thus (at 936 F.2d 370) "early retirement was not in the company's interest." These early retirement denials were made in 1987, and at that date clearly failed to meet the requirements of Treas. Reg. § 1.411(d)-4.[1]

B. At 936 F.2d 370, the Court of Appeals stated that in its "dual capacity" as employer, even though it was also a fiduciary, the employer could, for business reasons, eliminate "contingent employee benefits."[2] The issue is not

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[1] The court also said (936 F.2d at 370): "Later, after Congress enacted the Retirement Equity Act of 1984...LTV and the union agreed to amend the plan to eliminate subsection 2.6(d)." This is a misstatement of fact. REA was enacted two years before the first early retirement applications were made, the restated plan was adopted in 1986 after REA was enacted, and the agreement for the amendment to the restated plan to eliminate subsection 2.6(d) did not take place until long after the applications had been made and rejected.

[2] Hickman v. Tosco, 840 F.2d 564 (8th Cir. 1988) described the dual capacity doctrine but the facts involved a discharge, not an application for retirement. Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir.), cert. den. 110 S.Ct. 281 (1989) is also a quite different fact situation: a single employee terminated for cause who then applied for early retirement. Neither Hickman nor

(footnote continued)

whether it is a contingent benefit but whether (particularly since REA was enacted) it was a protected benefit.

Dockray v. Phelps Dodge, 801 F.2d 1149 (9th Cir. 1986), which was decided under the "arbitrary and capricious" standard (pre-Firestone v. Bruch, 109 S.Ct. 948 (1989)), nevertheless found that eligibility for 70/80 early retirement is a fiduciary decision, not an employer decision, and that substantial deference is not granted to a decision of a management plan administrator.

(footnote continued from previous page)
Dzinglski was decided on post-REA facts. Berger v. Edgewater Steel Co., 911 F.2d 911 (3rd Cir. 1990), cert. den. 111 S.Ct. 1310 (1991), was a post-REA case, but it based its decision on pre-REA cases and did not even mention the applicable Treasury Regulations issued under Internal Revenue Code § 411(d)-6 (29 U.S.C. § 1054(g)).

It should also be noted that at 936 F.2d 370 the Court of Appeals says that the pension committee did not breach its fiduciary duties in denying the applications because it had no authority to override the employer's business decision. The plan is to the contrary, however. Section 8.2(h) of the plan grants to the Committee the exclusive authority to grant or deny benefits. When the Employer adopted this restated plan in 1986 it had an ample opportunity to say otherwise.

C. The Court of Appeals said (936 F.2d at 370) that the employer did not violate ERISA when adopting the policy of denying early retirement without a permanent reduction in the work force; and the policy was not an amendment but merely a guideline used to decide whether early retirement was in the employer's interest. It is undisputed, however, that the employer did not apply this as a "guideline": (a) the employer made the decision that it was not going to grant hourly workers early retirement under subsection 2.6(d) even though it was willing to grant it to salaried workers; and (b) at some point in time it dressed this up by saying that it had to be accompanied by a permanent reduction in the work force, but the evidence presented with respect to the only two hourly early retirements granted did not support that they were accompanied by such a permanent reduction.[3]

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[3] The evidence, which consisted of two agreements
(footnote continued)

D. Then the Court below (936 F.2d at 371) states that while an employer "cannot decrease a participant's accrued benefit by amending a pension plan...", here the employees could not have an accrued benefit because they "have not satisfied the pre-amendment condition that their early retirement be in [the employer's] interest." That simply ignores the Treasury Regulations issued under Internal Revenue Code § 411(d)-6. Indeed, if an employer can, in its sole and absolute discretion, prevent a condition to qualify for early retirement from occurring, the employees can never satisfy that condition. The whole purpose of 29 U.S.C. § 1054(g)(2) was to provide that an employer could not through unfettered discretion reduce such

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(footnote continued from previous page)
between the local union and the employer, says nothing whatsoever about a permanent reduction in the work force, although it does speak to changes in the work rules. Nothing in § 2.6(d) of the plan itself ever addressed (a) denying early retirement if it was not accompanied by a permanent reduction in the work force or (b) denying early retirement generally to hourly workers.

protected early retirement benefits. The Court of Appeals has effectively repealed this protective statute by its circular argument.

II.

There was purposeful interference on the part of the employer in preventing the hourly employees from achieving early retirement under subsection 2.6(d).

Here, again, the Court of Appeals uses its circular argument to state that an employee could never become entitled to the early retirement and therefore no discrimination could exist. As in Gavalik v. Continental Can Co., 812 F.2d 834 (3rd Cir. 1987), cert. den. 484 U.S. 979, 108 S.Ct. 495 (1987), the employer, facing a decline in business, systematically set out to cut down on pension benefits and costs to prevent eligibility for 70/80 pension benefits. In Gavalik the Court of Appeals said that the employer's program to avoid liability for early retirement

benefits violated ERISA and it remanded for appropriate relief. In remanding, it made the point that if the employer's program was not direct proof of discrimination under § 510, "We are hard pressed to imagine a set of facts that would" (812 F.2d at 856). It also pointed out that the employer devised the scheme solely to avoid future benefits using layoffs and reduction of volume. Here the employer admitted it treated the hourly and salaried workers differently because of the potential costs to it in future and current benefits. And it put into permanent layoff hourly employees who could not achieve eligibility under § 2.6(d) while it kept those so eligible on a callback/layoff cycle designed to prevent them from claiming non-discretionary early retirement under §§ 2.6(a), (b) or (c).

It is clear from the opinion below that not only did the Court of Appeals believe that eliminating early retirement

benefits through employer discretion was not prohibited conduct, but it also came to a factual conclusion that the actions of the employer were not "purposeful interference."[4]

III.

The employer may not claim the right to deny discretionary benefits arbitrarily.

At 936 F.2d 370-371, it is stated by the Court of Appeals that "The employees basically complain subsection 2.6(d) is unfair because it allows [the employer] to decide unilaterally that early retirement is not in the company's interest...In the absence of any showing of bad faith, we decline to deny [the employer] of its

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[4] Here, again, the Court of Appeals indicated that the two early retirements allowed hourly employees, in agreement with the local union, somehow eliminated the discrimination argument. It is fairly clear that nothing that is agreed upon between the employer and the union overrides ERISA. Compare U.S.E.E.O.C. v. County of Calumet, 686 F.2d 1249 (7th Cir. 1982). Nothing in ERISA provides an exemption for collective bargaining. In Gavalik, cited above, it is noted that the union participated in fashioning the employer's scheme to cut benefits.

power to decide whether early retirement is in the company's interest." The Court of Appeals characterizes this as a complaint of unfairness or bad faith. It is neither: at least since REA was enacted, the "complaint" is that the employer is prohibited from unilaterally deciding that early retirement is not in its best interest. That amounts to a decision made solely in the discretion of the employer with respect to a benefit which is clearly protected under REA. Notwithstanding the cases cited by the Court below, if REA does not protect against this type of action, it gives no protection at all.

Judge Becker, in his concurring opinion in Hlinka v. Bethlehem Steel, at 863 F.2d 289, stated that the words in section 2.6(d) of the employer's plan are not satisfied by the employer's mere declaration that early retirement is not "in its interest." In addition, unlike that in Hlinka, this plan required under

section 2.6(d) that approval for early retirement would be "by applying like rules in a nondiscriminatory manner to like or similar circumstances"; no rules, however, were ever adopted.

Berger v. Edgewater Steel Company, 911 F.2d 911 (3rd Cir. 1990) cert. den. 111 S.Ct. 1310 (1991), is apparently regarded below as the controlling case. Berger cites Hlinka[5] and Dzinglski,[6] both of which dealt with an individual who was either discharged or "unique" and both of which had plans different from the employer's plan in this case. As distinguished from the facts at hand, Berger at page 919 states "The plan itself did not give fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Among

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[5] 863 F.2d 289 (3rd Cir. 1988).

[6] Dzinglski v. Weirton Steel Corp., 875 F.2d 1079 (4th Cir. 1989) cert. den. 110 S.Ct. 281 (1989), was not a post-REA case; and it involved a single employee terminated for cause who then applied for early retirement.

other factual matters which appeared to be important in the Berger decision was that there was no evidence of bad faith by the employer.[7] Berger states, at pages 919-920, "We express no opinion on whether a blanket refusal of benefits will be proper absent these facts." Judge Sloviter, in his dissenting opinion in Berger said, at pages 925-928, that the employer effectively nullified the 70/80 plan benefit, thus effectively amending the plan, that oral modifications to the plan to either increase or decrease benefits are prohibited[8], that employees were entitled to individual consideration of their applications, that on a summary judgment motion any doubt as to existence of a genuine issue should be resolved against the

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[7] Here there was ample evidence of bad faith (as in the Gavalik case), involving the use of pension funds to reduce the salaried workers but not to reduce the hourly workers unless some bargain could be struck with the local union, and using permanent layoff for younger workers but not those eligible for early retirement.

[8] See Hozier v. Midwest Fasteners, 908 F.2d 1155 (3rd Cir. 1990).

moving party, and that allowing the employer to amend its plan by an unwritten policy is inconsistent with ERISA.

We are of the view that the correct applications of ERISA and REA are in the Third Circuit's Gavalik decision and the dissenting opinion of Circuit Judge Sloviter in Berger, and that the decision below of the Eighth Circuit Court of Appeals rests on an interpretation of ERISA which is essentially pre-REA and which gives a license to employers never intended under ERISA.

CONCLUSION

In the circumstances of this case, the Retirement Equity Act of 1984 provides protection for the 70/80 early retirement benefit, and the employer-fiduciary may not, in its sole discretion, deny such benefit to an otherwise eligible employee or class of employees. Accordingly, this

Petition for Certiorari should be granted.

Dated: October 23, 1991.

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